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IN THE

Supreme Court of the United States

October Term 1969

No. [redacted] 510

FLORIDA CITRUS EXPOSITION, INC.
also known as
FLORIDA CITRUS SHOWCASE INC.,
Petitioner,

vs.

HUNGERFORD CONSTRUCTION COMPANY
a Michigan Corporation; and
CONTINENTAL CASUALTY COMPANY
an Illinois Corporation,
Respondents.

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of Respondents

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FREE PRESS PUB. CO., INC. - TAMPA

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CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of Respondents

Respondents respectfully pray that this Honorable Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 22, 1969.*

*Respondents will use the same references used by petitioner: "R____" refers to certified Transcript of Appendix used in the lower court.

"ST____" refers to certified Supplemented Transcript which contains all testimony except exhibits.

"A____" refers to Appendix to petition.

Petitioner will be referred to as "Owner"; Respondents will be referred to collectively as "Contractor".

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 410 F. 2d 1229.

QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE LOWER COURT IN A DIVERSITY CASE WHICH DISALLOWED AN AWARD OF LIQUIDATED DAMAGES UNDER CIRCUMSTANCES WHERE THE DAMAGES WERE CAPABLE OF PROOF AND WHERE THE LIQUIDATED DAMAGES WERE FAR IN EXCESS OF THE COMPENSATORY DAMAGES INDICATED FROM THE EVIDENCE CONFLICTS WITH THE APPLICABLE LAW OF THE SUPREME COURT OF THE UNITED STATES, THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL ON HIS MATTER OR THE APPLICABLE LAW OF THE STATE OF FLORIDA.

STATEMENT OF THE CASE

The Contractor disagrees with certain portions of the statement contained in the Owner's petition and will limit this statement to what Contractor deems necessary to correct inaccuracies in the Owner's statement.

The building, the construction of which is the subject matter of this case, was to have several uses of varying importance.

The primary purpose for the building was to be a permanent home for a citrus festival held once a year during February or March. (R 66, 67; ST 405, 406) Petitioner has never been denied the use of the building. (R 56; 70-71; 82; ST 220, 412, 413, 485, 486)

The specific liquidated damages provision in the contract was included to indemnify the Owner in the event it did not have the building for its show. (R 66; 405)

In addition to the primary use, there were several secondary uses either intended or considerd. The building had an office section. This portion of the building was occupied within the time provided for by the contract. (ST 220; R 56)

Two additional secondary uses were considered. One was to charge a daily admission to the public to see the building. The Lower Court found that "this use did not rise above a suggested use." (A 21) The other use was to rent the building to others for exhibitions such as an auto show.

The Owner maintains that the jury awarded it $49,500.00 for correction of the leaks in the concrete dome and $28,250.00 as liquidated damages. This statement is inaccurate. The jury verdict was a total of $77,750.00 for the Owner. No allocation was made by the jury as to the portion relating to actual damages and the portion relating to liquidated damages. (R 16; ST 1039)

Additionally, the sum of $28,250.00 based on $250.00 per day for 113 days is unsupported. There is nothing in the record to support the figure of 113 days.

The starting date for the contract was August 17, 1964. (ST 426) By virtue of the contract, the original completion date would have been 180 days later or February 13, 1965. (R 427) However, the original completion date was extended. There was an agreed extension of 21 days resulting from a change in the foundation

for the building. (ST 120, 170) There was also an agreed extension of 2½ days for delays due to labor disputes. (ST 120, 170) These two extensions would leave the completion date at March 9, 1965. Adding 113 days to March 9, 1965 would leave a date of June 30, 1965.

In addition there was an additional nine days delay because of rain. (ST 120) The Owner did not agree to these delays. (ST 170)

There is an inaccuracy in the statement of Owner that it is approximately June 25, 1965 when the Owner and Contractor broke off negotiations. In closing argument, Owner states that negotiations were not broken off until November 12, 1965. (ST 980)

The contract provisions in question are as follows:

"4. TIME OF CONSTRUCTION: All work under this Contract shall be completed within 180 calendar days. If required in order to complete the work within the specified time, then such work as necessary shall be done after regular working hours, on Saturdays or holidays, as may be required, to complete same without additional cost to the Owner. *A penalty will be invoked for later completion. Details regarding these provisions are contained herein.* (emphasis supplied)

5. LIQUIDATED DAMAGES FOR FAILURE TO COMPLETE WITHIN THE TIME LIMIT. The amount of $200 (sic) per calendar day will be assessed as the fixed, agreed liquidated damages to be deducted by the Owner from the sums due under contract provisions for each and every calendar day of delay in completion of the work beyond the expiration time above specified and as provided." (R 161-162)

The Lower Court remanded the case for a new trial on the question of the damages sustained by Owner. (A 22) The remand is not limited to damages sustained by failure to complete, but all damages suffered by the Owner, without liquidated damages.

REASONS FOR DENYING THE WRIT

1. The decision of lower court will have no adverse effect on government contracts in the areas of national defense and outer space development.

The cases cited by the Owner in attempting to show a conflict between the decision of the lower court in this case and other decisions of this court defeats the first reason for granting the writ maintained by the Owner.

The government contracts which Owner refers to would be between the United States or one of its agencies and a contractor. The contracts would be pursuant to legislative authority granted by the Congress of the United States.

Both the majority and the two dissenting opinions in the case of *Priebe & Sons v. United States* (1947), 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed 32, cited by Owner at Page 9 of the petition discuss the distinction between commercial transactions with the government in ordinary times and contracts pursuant to Congressional authority in other times. It is maintained that government contracts in the area of national defense and for outer space development are not ordinary commercial transactions like the construction of the building in question for a private, non-governmental corporation.

These distinctions therefore exist. The contract which is in question in the case at bar is not a government construction contract but is a private contract.

Secondly, the contract in question does not involve any extraordinary circumstances that would warrant applying any rule other than the rule to be applied to ordinary commercial transactions.

In addition, all the lower court in this case said was the damages in question were capable of proof and were disproportionate to the actual damages. Even the cases cited by the Owner involving government contracts in extraordinary circumstances would require opposite findings before liquidated damages would be allowed.

The case of *United States v. Bethlehem Steel Co.* (1906), 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed 731, involved a contract made in preparation for the expected war with Spain. In that case the court found:

> ". . . The circumstances were such that it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfill the contract . . ."
>
> 205 U.S. at page 121; 27 S.Ct. at page 456.

The court also found:

> ". . . The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty, and could not have meant liquidated damages . . ."
>
> 205 U.S. at page 121; 27 S.Ct. at page 456.

The foregoing findings are opposite in both instances from those in the present case.

From the foregoing, it is maintained that the decision below will not have any adverse effect on government construction contracts in the areas of national defense and outer space for the case below did not involve a government construction contract and, in any event, the lower court merely applied the existing law both as to private and government contracts.

2. The decision below is in harmony with the holding in the cases of this court cited by the Owner and there is no conflict between the decisions.

Prior to demonstrating the similarity or distinction between the present case and those cases of this Court or other United States Circuit Courts of Appeal, it should be noted that this is a case in which federal jurisdiction is invoked because of diversity of citizenship of the parties.

In *Ruhlin v. New York Life Insurance Co.* (1938), 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290, in a case decided after the decision in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, this court said:

> ". . . As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The rules indicate that the court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions'. No such showing was attempted by the petition . . ."

304 U.S. at page 206; 58 S.Ct. at page 861.

As will be demonstrated hereinafter, the decision of the lower court does not conflict with the law of the State of Florida. Notwithstanding the foregoing, lack of any conflict is readily apparent from a reading of the cases cited by the Owner.

The case of *Sun Printing and Publishing Assoc. vs. Moore* (1902), 183 U.S. 642, 22 S.Ct. 240, 46 L.Ed. 366, supports the position taken by the Contractor and the lower court, that is, a stipulated sum of damages "for the breach of several covenants of varying degrees of importance . . . may well be held to be a penalty . . ." (Owner's brief at page 7)

In the present case whether the contract documents themselves are considered or the actual intentions of the Owner as testified to by the agents of the Owner are considered, the contract provisions provide for the same damages for breaches of varying degrees of importance.

The Owner indicates in its brief that the building was 27% incomplete at the end of the time period for construction. The jury, however, found that the contractor had substantially performed the contract for the jury was instructed that if the contract was substantially performed the Contractor was entitled to recover the balance of the original contract price that was unpaid. (R 128; ST 1014) The jury awarded the Contractor the balance of the original contract amount and the lower court affirmed the award to the Contractor.

The Owner maintains that the contract clause was for completion of the building. Clearly then the same amount of damages would apply to the failure to complete the entire building as would apply to the failure to completely furnish door knobs or to completely furnish

other insignificant items that would not and could not cost $250.00 for each calendar day they remained unfurnished.

The decision of the lower court on this issue is in harmony with the decision in *Bignall v. Gauld* (1886), 119 U.S. 495, 7 S.Ct. 294, 30 L.Ed. 294, where the court held a provision providing for $10,000.00 damages in the event of a breach of a covenant to discharge a total of $39,000.00 in indebtedness to several parties varying from more than $8,000.00 to less than $10.00 (provisions of varying importance because of the dollar amount in question) to be excessive.

There are other provisions in the *Sun Printing and Publishing Assoc.* case, supra, which would allow the Contractor to cite that case in support of the holding of the lower court and demonstrating that there is no conflict.

Initially, the contract provision was for the breach of one covenant and one covenant only, failure to return a yacht to its owner. The stipulated damage clause was not to cover partial destruction to the yacht for a security or guaranty was to be procured by the lessee of the yacht to cover the damage.

Secondly, in reaching its opinion, the court cited cases which provided that two conditions must occur before liquidated damages will be allowed.

1) the sum stipulated must not be disproportionate to the presumable or probable loss, and,

2) the loss must not be readily ascertainable.

[See *Ward v. Hudson River Bldg. Co.* (1891), 125 N.Y. 230, 26 N.E. 256, cited at 183 U.S. 668; 22 S.Ct. 251.]

The lower court in the present case found neither of the conditions were met and therefore it was correct in holding the contract provision to be a penalty.

United States v. Bethlehem Steel Co. (1906), 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed. 731, has been discussed above. Here again, the finding by the lower court that the damages in the present case are "capable of proof" (A 21) and also "far in excess of . . . compensatory damages" (A 22) renders the decision of the lower court in harmony with the holding in *United States v. Bethlehem Steel Co.*, supra.

The same distinction is applicable to the case of *Wise v. United States* (1919), 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647. Here again, this court stated that if the damages are capable of proof or the stipulated damages are disproportionate to the actual possible damages, the court is justified in refusing to enforce a liquidated damages provision in a contract.

The decision in the *Wise* case, supra, also indicates that the parties considered the possibility that one of the two buildings in question might be completed and the second not. There is no such similar evidence in this case to relieve from the fact that the same amount of damages was to be assessed for complete or partial breach of the contract. Also, in the present case, the Owner had use of its building for its primary purpose within the allowed time. In the *Wise* case, supra, both buildings were delayed beyond the allowed time for completion.

The citation of the case of *Priebe & Sons v. United States* (1947), 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32, as in conflict with the decision of the Fifth Circuit Court of Appeals in this case is most interesting.

In that case this court reversed a decision of the Court of Claims which allowed the government to retain liquidated damages finding that the contract provision in question was a penalty. This court noted:

> ". . . But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust . . ."

332 U.S. at page 413; 68 S.Ct. at page 127.

Additionally, as mentioned above, both the majority and both dissenting opinions discuss the difference between government contracts and private contracts.

It therefore appears that the ruling of the lower court in the present case complies with the test set down by this court on numerous occasions in determining whether or not a contract provision is a penalty and unenforceable or a provision for liquidated damages and enforceable. The facts in this case when applied to those tests warrant the finding of the lower court that the provision was one for a penalty.

3. The decision below is in harmony with the holdings in the cases of the other Circuit Courts of Appeal cited by the Owner and there is no conflict between the decisions.

Contractor maintains that the decision of other Courts of Appeal on the subject of liquidated damages are no different than those of this court and not in conflict with the decision of the Fifth Circuit Court of Appeals in this case.

In *United States v. LeRoy Dyal Co.*, 186 F.2d 460 (3 Cir. 1950), the court found its decision was controlled by the majority in *Priebe & Sons, Inc. v. United States*, supra (1947), 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32.

The contract in the *LeRoy Dyal Co.* case, supra, was a government contract, not a contract between private parties. The court specifically mentioned it was not applying state law (186 F.2d at page 461) as was properly done in the present case.

Nowithstanding the aforementioned distinctions, the *LeRoy Dyal Co.* case, supra, is in harmony with the decision in this case for the court stated the liquidated damages were "not an unduly large amount" and "not so high as to provide a penalty." (186 F.2d at page 463) In this case we have an opposite finding and the two decisions are not in conflict.

The same argument as applied above is applicable to the case of *Southwest Engineering Company v. United States*, 341 F.2d 998 (8 Cir. 1965). The court noted at the outset that the contracts "were entered into pursuant to federal law by an authorized federal agency" (341 F.2d at page 100). The court thereafter sets forth succinctly the same two requirements mentioned in all of the cases cited by Owner:

> ". . . First, the amount so fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and second, the harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation . . ." 341 F.2d at page 1001.

Failure to meet either one of these requirements would be sufficient to support a finding that the contract provision was a penalty in the present case. Neither of these two requirements have been met.

It therefore appears that there is no conflict between the decision in this case and the decisions of the other courts of appeal on the same matter cited by the Owner and the writ should be denied.

4. The lower court properly applied the applicable law of the State of Florida governing this contract.

The lower court in this case applied the law on this matter in *Pembroke v. Caudill* (1948), 160 Fla. 538, 37 So.2d 538, 6 ALR 1395, as recited by the Supreme Court of Florida which is the controlling law in this diversity of citizenship case.

This court has recently said:

". . . The issue presents solely a question of state law and '[w]e ordinarily accept the determination of local law by the Court of Appeals . . ."

C.I.R. v. Estate of Bosch (1967), 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed. 2d 886 at page 1781.

The *Pembroke* case, supra, reviewed the existing law of the State of Florida on the subject of liquidated damages citing numerous prior decisions. The Fifth Circuit Court of Appeals has in the past applied the law as enunciated in *Pembroke v. Caudill,* supra, in finding a provision to be one for a penalty. In *Hook v. Bomar,* 320 F.2d 536 (5 Cir. 1963), the court quoted "in extenso" from the decision in *Pembroke.* (320 F.2d 539-540)

The lower court in this case found the facts as compared to the tests in the *Pembroke* case, supra, indicated that the contract clause in question was a penalty and not one for liquidated damages.

Owner maintains that there was only one reason for invoking the clause in question—failure by the Contractor to deliver a completed building. This is contrary to the Owner's testimony for its agents said:

> ". . . The fee which we asked for lateness was to indemnify us if we had to put on our show and had no building to put it on in, after we had contracted to have a building . . ." (R 66; ST 405)

The show was held in the building.

At the time this contract was executed, there were numerous ways in which the building could be incomplete, each one of which would be capable of proof. The only incompletion that would not be capable of proof was if the building was incomplete to the point that the annual show could not be held in the building. This did not occur; the show was held inside the building when contemplated.

The case of *Southern Menhaden Co. v. How* (1916), 71 Fla. 128, 70 So. 1000, was considered by the court in the *Pembroke* decision, supra. The Florida court again makes reference to the two requirements, both of which must be met before a court will enforce a provision for stipulated damages:

> ". . . the actual damages sustained per day would be exceedingly difficult to ascertain, if not impossible to measure by any standard . . ."

70 So. at page 1004

> ". . . In such case we think that it was competent for the parties to stipulate for liquidated damages, especially where the amount agreed upon does not appear to have been so unreasonable as to suggest an intention of the parties to provide for a penalty . . ."

70 So. at page 1004

". . . The sum stipulated does not appear to be disproportionate to the probable damages that the complainant might have sustained . . ."

70 So. at page 1004

". . . there would be no doubt that damage would result equal to, if not in excess of, the amount stipulated . . ."

70 So. at page 1004

The Owner at page 11 of its petition acknowledges that the contract provision in the *Pembroke* case was found to be a penalty provision because the same amount of damages would be assessed if the buyer defaulted in any one of a number of minor particulars, including failure for one day to meet a payment on the balance due. The same facts appear in this case. The building was complete enough to allow the annual show to be held. The building was complete enough to allow the owner to occupy the office section of the building. The building was complete to the extent that none of the materials or items required by the construction contract to be installed were omitted—the only damages awarded were for corrections to items already installed not for the omission of any items. The comparison to the *Pembroke* case, supra, seems inescapable.

The Owner seems to distinguish the *Pembroke* case, supra, because it involved a lease and not a construction contract. The landmark decision relied upon by Owner as creating an alleged conflict, *Sun Printing and Publishing Assoc. v. Moore,* supra, also involved a lease.

The Owner says at pages 11-12 of its petition:

> ". . . In construction contracts, the Florida Supreme Court, as shown by the *Menhaden* decision, supra, upholds liquidated damage provisions because of the uncertainty of damages in the event of failure to complete construction on time . . ."

In the present case, there was no uncertainty of damages. (A 21)

CONCLUSION

Whether the construction contract in question is considered, or the testimony of the Owner's agent regarding the purposes or uses for the building and reason for including a "fee for lateness" is considered, the following appears:

1) The contract provision for damages at the rate of $250.00 per day was the same for total breach or breach of any one of a number of particulars of varying degrees of importance.

2) The loss, if any, was capable of actual proof.

3) The sum of $250.00 per day was far in excess of the actual loss, if any, suffered.

All of the cases cited indicate in these circumstances the contract provision is a penalty and not a provision for liquidated damages. The Fifth Circuit Court of Appeals was correct in its application of the law as enunciated by the Supreme Court of Florida and its decision is in harmony with prior decisions of this court and other circuit courts of appeal on this matter.

For each of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, ANTHONY S. BATTAGLIA, one of the attorneys for Respondents, HUNGERFORD CONSTRUCTION COMPANY and CONTINENTAL CASUALTY COMPANY, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of September, 1969, I served a copy of the foregoing Brief of Respondents on the petitioner by mailing a copy in a duly addressed envelope, postage prepaid, to its respective attorneys of record as follows: J. A. McClain, Jr., Esquire, of the firm of McCLAIN, TURBIVILLE & HELLER, 615 Marine Bank Building, Tampa, Florida, and to J. Hal Connor, Esquire, of the firm of SUMMERLIN, CONNOR & THREADGILL, P. O. Box 793, Winter Haven, Florida.

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